

IN THE MATTER OF ARBITRATION BETWEEN

School Service Employees Local 284,
Union,

and

Independent School District No. 186,
Pequot Lakes, Minnesota
Employer.

OPINION AND AWARD

Grievance of Darald Wynn

BMS Case No. 08-PA-0275

ARBITRATOR:

Gerald E. Wallin, Esq.

DATE OF AWARD:

September 8, 2008

HEARING SITE:

Pequot Lakes, Minnesota

HEARING DATE:

April 23, 2008

RECORD CLOSED:

July 15, 2008

REPRESENTING THE UNION:

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JURISDICTION

The hearing in this matter was conducted on April 23, 2008. The undersigned was selected to serve as arbitrator pursuant to the parties' 2003-2007 collective bargaining agreement ("Agreement") and the procedures of the Minnesota Bureau of Mediation Services. The parties submitted a contract interpretation grievance to arbitration. The Employer raised arbitrability issues concerning two aspects of the grievance. The Agreement provisions calling for award issuance within thirty days after close of the record as well as a three-arbitrator panel were waived. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The final post-hearing reply brief was received as agreed on July 15, 2008, which closed the record, and the matter was taken under advisement.

ISSUES

The parties did not present a jointly agreed statement of the issues and authorized the arbitrator to frame the issue after hearing the opening statements and evidence. Accordingly, the following is found to fairly state the issues in dispute:

1. Did the Employer violate the agreement when it compensated the Grievant in accordance with Employer policy for substitute employees instead of providing him the wages and benefits specified in the Agreement?
2. What is the proper remedy if the foregoing substantive issue is answered in the affirmative?

BACKGROUND AND SUMMARY OF THE EVIDENCE

The instant dispute arose out of Grievant's extended continuous service as a substitute custodian in school year 2006-07. He began service as a substitute custodian in February of 2005 but worked only sporadically thereafter. He was able to fill in for the short term absences of permanent custodians when the demands of his full-time job permitted him to do so. He cared for a dairy herd from 6:00 a.m. to 1:00 p.m. but was generally able to perform the occasional custodial

work in the afternoons and evenings. That arrangement was to change in December of 2006.

One of the permanent custodians, DM, suffered a stroke in late 2006 and began an extended absence of unknown duration. DM was expected to return to his permanent position at some future date upon receiving a medical release to do so. Grievant was offered the opportunity to fill in during DM's extended absence and agreed to do so. He began working thereafter beginning on December 20, 2006. As things turned out, DM did not return from his extended absence until November 26, 2007, nearly one year later. Accordingly, Grievant consistently worked more than 14 hours per week and eventually worked more than 67 days in 2007.

The Minnesota Public Employment Labor Relations Act ("PELRA")¹ defines a public employee to be one who works more than 14 hours per week and more than 67 days in a year. The PELRA definition excludes from bargaining unit membership those persons whose seasonal or temporary employment does not meet those thresholds. Consistent with that law, the parties' Agreement explicitly incorporates the definition in its first three Articles as follows:

ARTICLE I PURPOSE

Section 1. Parties: THIS AGREEMENT, entered into between the school board of Independent School District No. 186, Pequot Lakes, Minnesota, hereinafter referred to as the employer, the School Service Employees Local 284, hereinafter referred to as the exclusive representative, pursuant to and in compliance with the Public Employment Labor Relations Act of 1971, as amended, hereinafter referred to as the PELRA of 1971, to provide the terms and conditions of employment for all employees of Independent School District No. 186, Pequot Lakes, Minnesota, who are not required to be certified by the State Board of Education, whose employment service exceeds the lesser of 14 hours per week or 35% of the normal work week and more than 67 days per year, excluding supervisory, confidential and transportation department employees.

ARTICLE II RECOGNITION OF EXCLUSIVE REPRESENTATIVE

Section 1. Recognition: In accordance with the PELRA of 1971, as amended, the school board recognizes School Service Employees Local 284 as the exclusive

¹ Minnesota Statutes Chapter 179A.03, Subd. 14.

representative for all employees of Independent School District No. 186, Pequot Lakes, Minnesota, who are not who are not required to be certified by the State Board of Education, whose employment service exceeds the lesser of 14 hours per week or 35% of the normal work week and more than 67 days per year, excluding supervisory, confidential and transportation department employees.

* * *

ARTICLE III DEFINITIONS

Section 1. Appropriate Unit: All employees of Independent School District No. 186, Pequot Lakes, Minnesota, who are not required to be certified by the State Board of Education, whose employment service exceeds the lesser of 14 hours per week or 35% of the normal work week and more than 67 days per year, excluding supervisory, confidential and transportation department employees.

Section 2. Terms and Conditions of Employment: The hours of employment, the compensation therefore including fringe benefits except retirement contribution or benefits. Terms and conditions of employment shall not include matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.

* * *

It is undisputed that Grievant was not a member of the bargaining unit when he began substituting for DM in December of 2006. However, he crossed the working-day threshold of 68 days in the Spring of 2007 and thereby became a member of the bargaining unit. The parties differ sharply in their views of the effect of that transition. Accordingly, the focus of the instant dispute is to ascertain the significance of that change. The Union contends that Grievant became entitled to the higher wages and also the fringe benefits provided by the Agreement as he continued to work through November 21, 2007. The Union's position is that Grievant should be deemed to have been immediately hired into a permanent position upon attaining membership in the bargaining unit. The Employer, to the contrary, maintains that Grievant's inclusion in the bargaining unit did not change the terms and conditions of his employment at all. Therefore, it was proper to continue to compensate Grievant in accordance with Employer policy. In this regard, the Employer's position

is that the parties' Agreement does not, and never has, applied to substitute employees that have not been formally selected and hired for permanent positions.

According to the evidence, Grievant had an excellent work record during DM's absence. Nonetheless, the Employer has not again called him to work as a substitute custodian after DM returned in November of 2007. The Union sees this treatment as unlawful punishment of Grievant for the grievance that was filed on his behalf by the Union. The Union cited a Minnesota Court decision² in support of this contention. According to the Employer's position, the cited case is not applicable. Its decision not to use Grievant while the instant grievance remains unresolved is consistent with its objective to keep costs down. If the award is adverse to the Employer's position, the use of Grievant will result in higher costs to use Grievant rather than some other available substitute who was not a member of the bargaining unit. The Employer is just being cost conscious in this regard. The Employer's superintendent provided no other reasons for avoiding Grievant. The Employer also maintained that grievance arbitration under the Agreement is not the proper forum for resolving such a claim. In addition, the Employer noted that the contention was not raised within the 10-day filing time limit for grievance matters under the Agreement.

The Union also introduced evidence about the handling of a similar matter that occurred in 2005. The Union became aware that another substitute custodian, CR, crossed the 68-day threshold in that year. The situation was eventually resolved when CR was apparently placed in a permanent custodian position and given retroactive seniority to the beginning of her continuous service as a long-term substitute. The seniority list in the record shows CR to have a seniority date of February 14, 2005 as a custodian. The parties also developed a Memorandum of Understanding in connection with the matter. It reads, in pertinent part, as follows:

MEMORANDUM OF UNDERSTANDING

Independent School District No. 186, Pequot Lakes ("District") and School Service Employees Local 284 ("Association") hereby agree as follows:

1. Effective immediately, the following language will be added to the Master Agreement.

²Marshall County Central Education Association v. Independent School District No. 441, 363 N.W.2d 126 (Minn.App. 1985)

2. p. 7 Section 1. New subd. Long-Term Substitutes
Long term substitutes do not qualify for recognition on the seniority list. Long term substitutes who are immediately thereafter hired for a permanent position, will have their seniority date reflect the first day of service as a long term substitute.
3. Section 4 Subd. 1 Eligibility
Insert the word “permanent” so that it reads, In order to be eligible for recall, a permanent employee must have worked a minimum of four (4) months.
4. This Memorandum of Understanding shall be considered to be a part of the 2003-07 collective bargaining agreement.

By signing below, the parties represent that they have read, understand, and agree to be bound by the terms of this Memorandum of Understanding.

* * *

The Memorandum of Understanding was signed by the Union and the Employer on August 30 and September 19, 2005, respectively.

At the time of the arbitration hearing, the parties had a tentative agreement out for ratification for the 2007-2009 period. It was stipulated that the tentative agreement incorporated the text of the Memorandum of Understanding without any change of significance.

The Union contended that the resolution of the CR situation constituted a binding practice demonstrating how the Agreement should be interpreted.

The instant grievance states: “Make employee whole” as the specific remedy requested. In this regard, the Union introduced evidence showing the amount of wage differential pay owing to Grievant as well as the value of fringe benefits such as sick and vacation accruals and health insurance benefits. The Employer also provided a similar tabulation based on payroll records consisting of Grievant’s actual time cards. Both of these wage differential illustrations began with Grievant’s 68th day of work.

The Employer also provided evidence of its compensation policy as it applied to substitute employees during the relevant time frame. This evidence included minutes of school board meetings, which were open to the public and were held pursuant to a publicly posted agenda, at

which the compensation policy for substitutes was addressed. This evidence showed that, prior to September 18, 2006, substitutes were paid \$8 per hour or "... 80% of the base." In addition, the policy provided for an increase from 80% to 90% of the base after working 160 hours. At the school board meeting on September 18, 2006, the Employer adopted an increase in substitute compensation to "... 92.5% of the beginning step of the Local 284 contract."

The Union also advanced a contention that the Employer should make the Union whole for Grievant's "Fair Share" contributions that were not collected because of the Employer's failure to notify the Union of Grievant's change of bargaining unit membership status. Once again, the Employer contended that grievance arbitration is not the proper forum for resolving such claims. In addition, the Employer noted that the claim was also raised outside of the filing time limit for the instant grievance. According to the record, the instant grievance was filed on May 23, 2007 and did not contain the fair share claim nor did it contain the unlawful punishment contention. The Fair Share contention was not made until July 18, 2007 when the instant grievance was appealed to Level III of the parties' grievance procedure.

OPINION AND FINDINGS

At issue in this dispute is the propriety of the Employer's actions in compensating Grievant as it did after the duration of Grievant's substitute custodial assignment caused him to become a member of the bargaining unit. After full consideration of the evidence and arguments presented at arbitration and in the post-hearing briefs, it is determined that the analysis of the issue has two components: First, the scope of the parties' 2003-07 Agreement, as it relates to substitute employees, must be ascertained and, second, the effect of the Memorandum of Understanding on that scope, if any, must be determined. Upon completion of this analysis, findings can be made about the various contentions that have been raised.

The initial scope issue seeks to ascertain the extent to which the parties' Agreement establishes any terms and conditions for substitute employees. The Union maintains that it did. The Employer contends that it did not and never has. In this regard, the Employer asserted at arbitration that, prior to the Memorandum of Understanding, the Agreement ("Main Agreement") made no reference to "substitute" employees whatsoever. This proved to be not entirely correct and will be

discussed later. For now, the record provides several considerations bearing on this issue. Recall that the text of the first three Articles of the Main Agreement cite the PELRA definition of who can be a member of the bargaining unit. It is clear from the text of these three Articles that the Union, as exclusive representative, was limited to negotiating the terms and conditions of employment for only those employees who met the PELRA definition of a public employee. Article III explicitly recognizes that the terms and conditions of employment that it would seek to establish would not include matters of inherent managerial policy. Thus, the first consideration emerges from this: The evidence presented at arbitration did not show that there were any substitute employees who held bargaining unit membership when the Main Agreement was bargained. It follows, therefore, that when the Main Agreement was negotiated, the bargaining unit consisted only of employees who held permanent positions. Second, Article III, Definitions, does not contain any definition for a substitute employee. Third, Article VII provides for sick leave accrual only for 9, 10, 11, and 12-month employees. While a long-term substitute employee can achieve bargaining unit membership status on the 68th work day, which would take slightly more than 3 months at 5 days per week, it is not clear that any sick leave accrual provision would apply to that person. Fourth, the Main Agreement lists some 28 different job classifications that comprise the bargaining unit. The Main Agreement, however, fails to explain how to handle the classification of a long-term substitute whose 68 days of work were served as a substitute in two or more of these classifications. It is easily conceivable that employees could substitute in such an arrangement. However, the Main Agreement is entirely silent on the disposition of such a question. Sixth, Article X, Section 1 requires that all job openings, new positions and vacancies must be posted for six days before being filled. But it is undisputed that the Employer uses a ballpark figure of 50 to 100 substitute employees per month. There is no evidence that these kinds of vacancies are ever posted. Moreover, there is no evidence that either CR's or Grievant's long-term substitute opportunities were ever posted. Grievant was merely asked because he had done a good job beforehand and was thought to be available. At the time he was verbally offered the opportunity, given the nature of the absence he was covering, it was likely that the opportunity would not be of short duration. The record does not contain any evidence that the Union has ever filed any grievances to protest the lack of posting for such substitute assignments. Seventh, it is undisputed that the Employer has publicly provided for the compensation of substitute

employees as a matter of policy separate from the Main Agreement. When the subject has been considered, the agenda has been posted for public notice and debate at the meeting. There is no evidence that any grievances have been filed to challenge the Employer's policy action.

The final consideration is found in Article VI, Section 6. It is the only provision in the Main Agreement that has been found to contain any reference to substitute employees. It reads in full as follows:

Section 6. Employees as Substitutes: An employee substituting or replacing another employee on a temporary basis and said position(s) rate of pay is more, shall receive the difference after the third consecutive day retroactive to the start of said service. An employee shall not make less than what they would regularly make in their position.

If the foregoing provision of the Main Agreement was intended to apply to Grievant's type of long-term substitute employment, one would have expected the Union to have advanced that contention not only in the grievance process but also at arbitration. It did neither. Instead, its wage differential claim presented at arbitration began with his 68th day of work and not his first. Moreover, Article XII, Section 8, Subdivision 4 mandates that the Union provide the arbitrator with a Submission of Grievance Information prior to the hearing. Among the information required is a statement of the issues. While the submission does list the provisions of the Main Agreement that were allegedly violated, it does not list Article VI, Section 6 among them.

Although the Union did contend that Article VI, Section 6 is applicable in its initial post-hearing brief, it appears this was done as an afterthought when the provision was discovered. According to the Employer's post-hearing brief, Article VI, Section 6 only applies to employees who were already hired into and holding permanent positions who are temporarily substituting for another permanent employees. In its reply brief to the Employer's assertion, the Union appears to have abandoned the contention. It was not raised again.

Taken together, the foregoing considerations constitute a strong inference that the Main Agreement does not, as the Employer contends, speak to Grievant's type of long-term substitute employment. It remains for consideration whether the CR incident and the resulting Memorandum

of Understanding create a superseding inference.

The Union's position advances two primary contentions based on the CR matter. According to that position, the handling of the CR matter constitutes a binding past practice that dictates how future similar matters are to be treated. Secondly, the Memorandum of Understanding provides that Grievant should be treated as though he was immediately hired into a permanent custodian position and afforded all of the wages and benefits, including recall rights, provided by the Agreement.

It is well settled in labor arbitration that a binding past practice usually requires a period of time to elapse during which a consistent pattern of behavior emerges. A particularly good explanation of the past practice doctrine can be found in the article authored by Richard Miententhal entitled, *Past Practice and the Administration of Collective Bargaining Agreements*.³ Absent extraordinary circumstances, a single incident cannot ordinarily give rise to a binding past practice. The term "practice" itself connotes repetition. Indeed, the body of published arbitration awards has recognized repetition, along with clarity, consistency, and longevity, as one of the four hallmark characteristics that identify a past practice.

Although the record establishes that CR became a permanent custodian after her long-term substitute assignment exceeded 67 days in 2005, the record provides little other meaningful information. Neither of the Union's witnesses who had some familiarity with the CR matter could provide it. They either did not know or could not recall the pertinent details about the resolution. As a result, the record does not clearly establish how she was hired into her permanent position. The record establishes only that the job was not posted and the lack of a posting was not grieved. This suggests that the resolution was a compromise settlement. The record does not establish whether there was an existing vacancy or if a new position was created for her. There is no evidence that she was paid any wage differential retroactive to her 68th day of work. There is no evidence that she was retroactively credited with any sick leave or vacation accruals. There was no evidence she was provided any retroactivity on health insurance benefit payments. Finally, there is no evidence that clearly shows the CR settlement to have been precedent-setting.

Under the circumstances, the evidence surrounding the handling of the CR matter is

³ Proceeding of the 14th Annual Meeting of the National Academy of Arbitrators, BNA Books (1961). The article is available to the public on the NAA website NAARB.ORG under the Tab for Proceedings.

insufficient to establish a binding past practice. None of the four hallmark characteristics have been demonstrated. Clarity is lacking in that the details of the disposition are far from clear and the single incident does not satisfy the characteristics of consistency, longevity, and repetition.

Turning to the Memorandum of Understanding, the text of paragraph 2 is found to be particularly meaningful to the analysis of its proper application. As noted previously, it reads as follows:

Long term substitutes do not qualify for recognition on the seniority list. Long term substitutes who are immediately thereafter hired for a permanent position, will have their seniority date reflect the first day of service as a long term substitute.

According to the Union's position, this paragraph means that a substitute who becomes a bargaining unit member simultaneously becomes a permanent employee on the 68th day of work. If true, however, it would effectively render the first sentence to be meaningless surplus language.

As written, the two sentences appear to recognize two significantly different conditions. The first sentence suggests that long-term substitutes do not gain seniority in the general case no matter how long they might work in that capacity. It does not distinguish between long-term substitutes who may become members of the bargaining unit and those who do not. The second sentence appears to qualify the first by providing, however, that *if* a long-term substitute is immediately hired into a permanent position from the long-term substitute assignment, *then* the employee will be granted a seniority date corresponding with the first day of substitute service. Significantly, the second sentence also does not create a distinction based on bargaining unit membership. Thus, the two sentences, when read together, appear to recognize two situations: Long-term substitutes that are immediately hired into permanent position and those who are not. It follows, therefore, that merely becoming a bargaining unit member via long-term substitute work is essentially irrelevant to the acquisition of seniority and/or permanent employee status.

There is one final consideration in the form of a contractual loophole that would exist in the Union's position. The bedrock feature of the Union's position is that a long-term substitute who becomes a "public employee" per PELRA by crossing the 68-day threshold immediately becomes a permanent employee within the meaning of the Agreement and acquires retroactive seniority. If

this scenario was true, then the Employer could effectively evade its job posting obligation under Article X by verbally hiring a temporary substitute and then letting that person accumulate 68 days of work in a year. By so doing, the Employer could obtain a new permanent employee without allowing existing members of the bargaining unit to know about or have access to the vacancy.

Due consideration of the foregoing discussion factors now leads the undersigned to make the following findings:

1. Other than as provided in the Memorandum of Understanding, the Agreement does not contain terms and conditions of employment for long-term substitute employees whether or not the long-term substitute is a member of the bargaining unit.
2. The Union is entitled to bargain with the Employer over the terms and conditions of employment of long-term substitute employees who are members of the bargaining unit but has not yet done so regarding the compensation and benefit issues involved in the instant grievance.
3. Article VI, Section 6 applies only to permanent employees who substitute in other positions. The compensation of non-permanent substitute employees remains a matter of Employer policy until the Union bargains otherwise.
4. Grievant did not gain seniority or permanent employee status as a result of becoming a member of the bargaining unit. Accordingly, Grievant does not have any right of recall in accordance with seniority to a permanent custodial vacancy.
5. The Employer did not violate the Agreement when it compensated the Grievant in accordance with Employer policy for substitute employees instead of providing him the wages and benefits specified in the Agreement.
6. The Union's claims of unlawful punishment of Grievant and Fair Share liability are outside the scope of the instant grievance. Accordingly, no findings are made with respect to those claims.
7. As a result of the foregoing findings, the instant grievance must be and is denied.

AWARD

The grievance is denied as more fully described in the Opinion and Findings.

Gerald E. Wallin, Esq.
Arbitrator

September 8, 2008